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In the Supreme Court of the United States

OCTOBER TERM, 1966
No. 255

THE CITIES OF CANTON, CLEVELAND, AND MASSILLON, OHIO,
Petitioners,
vs.
THE PUBLIC UTILITIES COMMISSION OF OHIO
and
THE EAST OHIO GAS COMPANY,
Respondents.

BRIEF OF RESPONDENT, THE PUBLIC UTILITIES COMMISSION OF OHIO, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

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THE JUDSON-BROOKS COMPANY—CLEVELAND

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STATEMENT

This brief is filed in opposition to the Petition for Writ of Certiorari to the Supreme Court of Ohio of the Cities of Canton, Cleveland, and Massillon, Ohio, whereby these Cities petition this Court to review the decision of the Supreme Court of Ohio in the Cities of Akron, Canton, Cleveland and Massillon, Ohio, v. Public Utilities Commission of Ohio, The East Ohio Gas Company, 5 Ohio St. 2d 237. It shall be the purpose of this brief to demonstrate that the Supreme Court of Ohio was never required to decide a federal question. As a consequence, the Petition is without merit, raises no basis upon which to invoke this Court's jurisdiction and should be denied.

ARGUMENT

The Petition for Writ of Certiorari (hereinafter called the Petition) should be denied due to the fact that the Supreme Court of Ohio (hereinafter sometimes called the Ohio Court) did not decide any federal question for a decision of the federal question wasn't necessary to the determination of the case. It must affirmatively appear from the record not only that a federal question was presented for decision to the highest court of the state having jurisdiction, but that its decision of the federal question was necessary to the determination of the case, *Southwestern Bell Telephone Company v. Oklahoma*, 303 U.S. 206, 212-213.

Why wasn't a federal question decided by the Ohio Court? Because the Ohio Court did not find any federal constitutional question presented for its consideration. That Court found (Appendix C at page 65-66 of the Petition) as follows:

> "We have reviewed the rulings made and the time allowed by the commission as disclosed by the record. Neither the rulings nor orders called to our attention nor the overall record indicates an abuse of discretion.
>
> "Argued in the brief as showing a lack of due process were specific rulings of the court admitting evidence offered by the company over objection by the cities and rulings of the commission excluding evidence offered by the cities either upon objection or *sua sponte. Lumped with these specific objections were arguments that the commission's failure to rely upon the opinions of the cities' experts admitted and/or the commission's exclusion of the opinions of the cities' experts in matters concerning reproduction-cost-new of the inventory and/or the commission's greater reliance upon the report of its own staff or company*

witnesses in this area somehow amounted to lack of due process. . . .

"The remainder of the appellants' contentions and arguments in this area relate to judgments by the commission in weighing the evidence. This court has repeatedly held that it will not substitute its judgment for that of the commission as to conclusions drawn from evidence, unless the findings and order of the commission are manifestly against the weight of the evidence or there is no evidence. *City of Kenton v. Pub. Util. Comm.*, 3 Ohio St.2d 71, 73. *There is evidence supporting all aspects of the order appealed from and no finding of the commission is against the manifest weight of the evidence.*" (Emphasis added.)

The Court (Appendix C at page 64 of the Petition) also stated:

"It is observed throughout the record that *extreme latitude was granted to counsel for the cities at all times.*". (Emphasis added.)

From the foregoing it is clear that the Ohio Court has decided the case on the basis of state law and this Court has held that it is without jurisdiction on certiorari to review holdings of state courts which solely concern matters of state law. *Neblett v. Carpenter*, 305 U.S. 297, 83 L.ed. 182, 59 S. Ct. 170, reh. den., 305 U.S. 675, 83 L.ed. 437, 59 S. Ct. 335.

The Cities in their Petition alleged that the question before this Court is of national importance and to give import to their position, the Cities have apparently claimed several roles, as cities, as ratepayers, and as representatives of ratepayers within their particular municipal boundaries.

Even a cursory reading of the Fourteenth Amendment to the Constitution of the United States would cast doubt upon the right of a city to assert any right under it to due

process of law. That amendment, setting forth prohibitions against states, in pertinent part is:

> "* * *, nor shall any state deprive any person of life, liberty or property, without due process of law, * * *"

Cities are created by, creatures of, and political subdivisions of, the state. Thus,

> "A municipal corporation created by a state for the better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator."

Williams v. Mayor of Baltimore, 289 U.S. 36, 40.

The heart of the Cities' due process of law for ratepayers argument is that in some fashion due process of law was deprived them by the "arbitrary action" of The Public Utilities Commission of Ohio in utilizing a Staff Report prepared in some part by a member of its Staff, Mr. Paul R. Hampton, who subsequently left its employment. The Ohio Court, in considering questions relating to the Staff Report (Appendix C at page 66 of the Petition) stated:

> "The staff report, prepared as required by Section 4909.19, Revised Code, was competent evidence in this cause. *Lindsey v. Pub. Util. Comm.*, 111 Ohio St. 6.
>
> "Manifestly, the staff report does not need 'testimonial support' as the cities contend. See, also, *City Marietta v. Pub. Util. Comm.*, 148 Ohio St. 173.
>
> "The burden of opposing this evidence rests with the cities. They must present evidence that is credible, authoritative and challenging. See *City of Columbus*

v. Pub. Util. Comm., 154 Ohio St. 106; *City of Cleveland v. Pub. Util. Comm.*, 164 Ohio St. 442."

Certainly, as we have stated above, the Ohio Court did not find it necessary to base its decision on a federal question, but rather upon the lack of credible, authoritative and challenging evidence presented by the Cities. Where is the "national importance"? Was the Staff Report some sort of hidden document? On the contrary, 108 municipalities and 13 Ohio Counties were served with copies of the Staff Report and only 26 filed objections and only the Cities of Akron, Canton, Cleveland, and Massillon appeared when the hearings on the merits began. (See Appendix C at page 62 of the Petition.) Assuming for the sake of argument that the Cities' position is correct, what would be the end result? The Cities argue that each ratepayer should be entitled fully to participate at public utility hearings with all the attendant safeguards which must be granted to the public utility whose property is subject to confiscation. East Ohio Gas alone numbers among its consumers over 800,000 consumers in the area affected by the rate proceeding. Should each consumer be entitled to such participation at public utility hearings? Certainly not. The process would be so cumbersome and unwieldy that the effectiveness of all state regulatory agencies would be at an end. Would due process of law be served? No. If each consumer spent only one day to conduct cross-examination, put in his, hers or its direct case, in argument and other aspects of the proceeding, the Commission hearings would have lasted approximately 800,000 days or well over 2,000 years. Such a procedure would make rate regulation not only unworkable but also clearly unconstitutional. Rates could never be set for the utility service. In *Smith v. Illinois Bell Telephone Company*, 270 U.S. 587, at 591, the United States Supreme Court laid down the simple common sense proposition that:

"Property may be effectively taken by long-continued and unreasonable delay in putting an end to confiscatory rates as by an express affirmance of them; * * *."

The position of the ratepayer in a public utility hearing is summarized in *Brooklyn Union Gas Co. v. City of New York*, 50 Misc. 450, 100 N. Y. Supp. 570, affirmed by the Appellate Division at 115 App. Div. 69, 100 N. Y. Supp. 625, affirmed by the New York Court of Appeals at 188 N. Y. 334, 81 N.E. 141, as follows (100 N. Y. Supp. at page 578):

"The distinction between the right of the public utility corporation and the consumer to review legislative action fixing rates is that, in the case of the former, constitutional rights may be affected by an unreasonable rate. In the case of the latter they cannot be. The consumer is not left under such circumstances at the mercy of a public utility corporation. But he must seek his protection through the Legislature and not through the courts."

Finally, the Cities allege that the Commission acted contrary to the holding of this Court in *Ohio Bell Telephone Co. v. Commission*, 301 U.S. 292, 81 L.ed. 1093. Nothing could be further from the truth. In the *Bell* case, the Court (81 L.ed. at page 1099) stated what course of events leads to a denial of due process.

"* * * Without warning or even the hint of warning that the case would be considered or determined upon any other basis than the evidence submitted, the Commission cut down the values for the years after the date certain upon the strength of information secretly collected and never yet disclosed. The company protested. It asked disclosure of the documents indicative of price trends, and an opportunity to examine them, to analyze them, to explain and to rebut

> them. The response was a curt refusal. Upon the strength of these unknown documents refunds have been ordered for sums mounting into millions, the Commission reporting its conclusion, but not the underlying proofs. The putative debtor does not know the proofs today. This is not the fair hearing essential to due process. It is condemnation without trial."

That is not the case here. As stated above, all parties involved received a copy of the Staff Report in question. Where the valuations adopted by the Commission were based on trends, the trends used were specifically included in the record and subject to considerable cross-examination and in many instances were the basis of the valuation evidence submitted by the Cities. The failure was upon the part of the Cities in not presenting "credible, authoritative and challenging" evidence, and nothing more.

For all of the foregoing reasons it is respectfully submitted that the Petition presents no basis upon which to invoke this Court's jurisdiction on certiorari and should be denied.

Respectfully submitted,

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